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CD Integrated Sdn Bhd v Emerico Sdn Bhd

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02(NCVC)(W)-2380–11 OF 2018
ZALEHA YUSOF, LAU BEE LAN AND AZIZAH NAWAWI JJCA
5 OCTOBER 2020

C *Contract — Breach — Breach of agreement — Plaintiff claimed for damages — Whether there was agreement between plaintiff and defendant for purchase of 5,000 units of point of sale terminal ('POST') over period of five years and maintenance for five years — Whether contract subsisted — Whether burden of proof on defendant to call witness — Whether plaintiff entitled to damages*

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This was an appeal against the decision of the High Court which had allowed the plaintiff's claim for damages premised on a breach of contract. The plaintiff was a company which was involved in the business of developing and servicing banking and retail technology. The defendant was a company in the business of E selling computers and network integration system. The defendant had approached the plaintiff to assist them in providing agent banking system for Bank Simpanan National Bhd ('BSN') with a new banking system created by the plaintiff known as the Alexis System. After several discussions and presentations, BSN had indicated its intention to purchase the point of sale F terminal ('POST') from the defendant, bundled with the maintenance service for the said terminals. Vide a letter of offer/appointment, BSN had appointed the defendant to supply 1,000 units of POST for the BSN Agent Banking ('BSN project') for a contract sum of RM6.48m. The plaintiff then issued the quotation to the defendant. Having obtained the contract from BSN, the G defendant issued a purchase order to purchase a total of 1,000 units with barcode scanner from the plaintiff. The plaintiff terminated the agreement with the defendant when the defendant did not issue another purchase order for the BSN project. The plaintiff then filed this suit for a breach of agreement by the defendant and for the return of the goods owned by the plaintiff. The H plaintiff took the position that the parties had a valid contract for five years for the purchase of 1,000 units of POST per year, with a total number of 5,000 units of POST. The main defence of the defendant was that there was no agreement to purchase 5,000 units of POST, and the agreement was only to purchase of 1,000 units of POST with free maintenance from the first year and I maintenance fee for the second year onward. The High Court found that there was a valid and binding contract between the parties. Hence, this appeal by the defendant.

Held, allowing the appeal with costs:

(1) The factual matrix did not support the judge's finding. There was no documentary evidence to show that the defendant had agreed to purchase 5,000 units of POST from the plaintiff for the BSN project. The documents clearly established that the parties had agreed to the sale and purchase of 1,000 units of POST. The contractual relationship between the plaintiff and the defendant subsisted from the quotation issued by the plaintiff and the purchase order issued by the defendant. The note in the presentation to BSN which states of 'a yearly commitment order of 1,000 units' of POST was merely a proposal and BSN's letter of offer/appointment clearly confirmed that the supply was only for 1,000 units of POST. The performance of the parties to the contract was in relation to the supply of 1,000 units of POST, not 5,000 units (see paras 23–25, 27–28 & 30).

(2) The trial judge had failed to explain how the surrounding circumstances clearly established an intention to contract for the supply of 5,000 units of POST over a five-year period. The surrounding circumstances merely evinced the intention of the parties to contract for the supply and purchase of POST for the BSN project and this crystallised with the purchase of 1,000 units of POST by the defendant for the BSN project. The conduct of the parties in entering into the sale and purchase agreement of 1,000 units of POST clearly negated the plaintiff's assertion that the parties had intended a five-year supply of 5,000 units of POST (see paras 34 & 37).

(3) The trial judge had made an error in law when he held that the defendant should have called a witness from BSN to ascertain if the real intention of BSN was to buy the 1,000 units or 5,000 units over a five-year period. It was the plaintiff's case that there was an agreement for the sale and purchase of 5,000 units of POST, the burden was on the plaintiff to call the witness from BSN to explain the real intention of BSN. The onus was not on the defendant to prove otherwise, as the plaintiff must establish the fact of a contract for the supply of 5,000 units of POST (see para 41).

(4) The trial judge had failed to consider and appreciate the defendant's email to BSN. From the exchange of emails, there was nothing to show that BSN had agreed to purchase 5,000 units of POST over a five-year period. The defendant's email made reference to a possible renewal of the supply contract, whilst BSN's reply was for the defendant and the plaintiff to submit the proposal, which was still subject to management approval (see paras 43–44).

(5) Since there was no contract for the supply of POST for a period of five years together with the maintenance charges, the finding on damages was without basis and must be set aside. The defendant was not liable to pay

A the maintenance charges for the second year onward as the plaintiff had terminated the contract, albeit on the maintenance issue (see paras 46–47).

[Bahasa Malaysia summary

B Ini adalah rayuan terhadap keputusan Mahkamah Tinggi yang membenarkan tuntutan plaintif untuk ganti rugi berdasarkan pelanggaran kontrak. Plaintif adalah syarikat yang terlibat dalam perniagaan pembangunan dan perkhidmatan teknologi perbankan dan runcit. Defendan adalah syarikat dalam perniagaan penjualan komputer dan sistem integrasi rangkaian. C Defendan telah menemui plaintif untuk membantu mereka dalam menyediakan sistem perbankan ejen untuk Bank Simpanan Nasional Bhd ('BSN') dengan sistem perbankan baru yang dibuat oleh plaintif yang dikenali sebagai Sistem Alexis. Setelah beberapa perbincangan dan pembentangan, D BSN telah menyatakan niatnya untuk membeli point of sale terminal ('POST') daripada defendan, bersama-sama dengan perkhidmatan penyelenggaraan untuk terminal tersebut. Melalui surat tawaran/lantikan, BSN telah melantik defendan untuk membekalkan 1,000 unit POST bagi Perbankan Ejen BSN ('projek BSN') untuk kontrak berjumlah RM6.48 juta. E Plaintif kemudian mengeluarkan sebut harga kepada defendan. Setelah memperoleh kontrak dari BSN, defendan mengeluarkan pesanan pembelian untuk membeli sejumlah 1,000 unit dengan pengimbas kod bar daripada plaintif. Plaintif menamatkan perjanjian dengan defendan ketika defendan tidak mengeluarkan pesanan pembelian lain untuk projek BSN. Plaintif F kemudian memfailkan saman ini kerana melanggar perjanjian oleh defendan dan untuk mengembalikan barang yang dimiliki oleh plaintif. Plaintif menyatakan bahawa pihak-pihak mempunyai kontrak yang sah selama lima tahun untuk pembelian 1,000 unit POST per tahun, dengan jumlah keseluruhan 5,000 unit POST. Pembelaan utama defendan adalah bahawa G tidak ada perjanjian untuk membeli 5,000 unit POST, dan perjanjian itu hanya untuk membeli 1,000 unit POST dengan penyelenggaraan percuma dari tahun pertama dan bayaran penyelenggaraan untuk tahun kedua dan seterusnya. Mahkamah Tinggi mendapati bahawa terdapat kontrak yang sah dan mengikat antara kedua-dua pihak. Oleh itu, rayuan ini oleh defendan.

H

Diputuskan, membenarkan rayuan dengan kos:

(1) Matriks fakta tidak menyokong penemuan hakim. Tidak ada keterangan dokumentari untuk menunjukkan bahawa defendan telah bersetuju untuk membeli 5,000 unit POST daripada plaintif untuk projek BSN. I Dokumen dengan jelas membuktikan bahawa pihak-pihak telah bersetuju untuk penjualan dan pembelian 1,000 unit POST. Hubungan kontrak antara plaintif dan defendan wujud daripada sebut harga yang dikeluarkan oleh plaintif dan pesanan pembelian yang dikeluarkan oleh defendan. Catatan dalam pembentangan kepada BSN yang menyatakan

'a yearly commitment order of 1,000 units' POST hanyalah cadangan dan surat tawaran/lantikan BSN dengan jelas mengesahkan bahawa pembekalan itu hanya untuk 1,000 unit POST. Pelaksanaan pihak-pihak dalam kontrak adalah berkaitan dengan pembekalan 1,000 unit POST, bukan 5,000 unit (lihat perenggan 23–25, 27–28 & 30).

(2) Hakim bicara gagal menjelaskan bagaimana keadaan sekitar dengan jelas membuktikan niat bagi kontrak untuk membekalkan 5,000 unit POST dalam tempoh lima tahun. Keadaan sekitar hanya membuktikan niat pihak-pihak bagi kontrak untuk pembekalan dan pembelian POST untuk projek BSN dan ini dibentuk dengan pembelian 1,000 unit POST oleh defendan untuk projek BSN. Tingkah laku pihak-pihak dalam menandatangani perjanjian jual beli 1,000 unit POST dengan jelas membantah pernyataan plaintif bahawa pihak-pihak tersebut telah menginginkan bekalan lima tahun sebanyak 5,000 unit POST (lihat perenggan 34 & 37).

(3) Hakim bicara telah melakukan kesalahan undang-undang ketika dia memutuskan bahawa defendan harus memanggil seorang saksi dari BSN untuk memastikan jika niat sebenar BSN adalah untuk membeli 1,000 unit atau 5,000 unit dalam jangka waktu lima tahun. Adalah kes plaintif bahawa terdapat perjanjian untuk penjualan dan pembelian 5,000 unit POST, yang menjadi beban plaintif untuk memanggil saksi dari BSN untuk menjelaskan niat sebenar BSN. Beban bukan di atas defendan untuk membuktikan sebaliknya, kerana plaintif yang perlu membuktikan fakta kontrak untuk pembekalan 5,000 unit POST (lihat perenggan 41).

(4) Hakim bicara gagal mempertimbangkan dan menghargai e-mel defendan kepada BSN. Daripada pertukaran e-mel, tidak ada yang menunjukkan bahawa BSN telah bersetuju untuk membeli 5,000 unit POST dalam tempoh lima tahun. Emel defendan merujuk kepada kemungkinan pembaharuan kontrak pembekalan, sementara jawapan BSN adalah untuk defendan dan plaintif untuk mengemukakan cadangan, yang masih harus mendapat persetujuan pihak pengurusan (lihat perenggan 43–44).

(5) Oleh kerana tidak ada kontrak untuk pembekalan POST selama lima tahun bersama dengan caj penyelenggaraan, penemuan ganti rugi adalah tidak berasas dan harus diketepikan. Defendan tidak bertanggungjawab untuk membayar caj penyelenggaraan untuk tahun kedua dan seterusnya kerana plaintif telah menamatkan kontrak, walaupun isu penyelenggaraan (lihat perenggan 46–47).]

Cases referred to

Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd [2010] 1 MLJ 597, FC (refd)

A *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; [2004]4 CLJ 309, FC (refd)
Kwek Seow Kee (No 1) & Anor v KT Packaging Sdn Bhd [1998] MLJU 36; [1988] 2 CLJ Supp 472, HC (refd)
Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor [2003] 2 MLJ
B 97; [2003] 2 CLJ 19, CA (refd)
RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG [2010] 3 All ER 1, SC (refd)
Sang Lee Co Sdn Bhd v Subramaniam a/l Mayawan & Ors [2011] 5 MLJ 374; [2012] 6 MLRA 416, CA (refd)
C *Teras Kimia Sdn Bhd v Kerajaan Malaysia* [2014] 7 MLJ 584; [2014] 4 MLRH 429, HC (refd)

Appeal from: Suit No BA-22NCVC-284-05 of 2017 (High Court, Shah Alam)

D

Adnan bin Seman (Adnan Sharida & Assoc) for the appellant.
Loh Chu Bian (with him Lee Wei Ting) (Himahlini & Loh) for the respondent.

Azizah Nawawi JCA:

E

[1] This is an appeal against the decision of the High Court in Shah Alam, Selangor dated 29 October 2018 which had allowed the plaintiff's claim for damages premised on a breach of contract.

F **[2]** After a full trial, the High Court found that there was a valid and binding contract between the parties and ordered, inter alia, that the defendant is to pay the plaintiff:

(a) RM9.8m being the damages suffered by the plaintiff due to the defendant's failure to purchase the remaining 4,000 units of terminal; and
G

(b) RM6,892,968 being the damages suffered by the plaintiff due to the defendant's failure to continue with the maintenance of 5,000 units of terminal for the following four years.

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[3] Having considered the appeal records and the submissions of the parties, this court has allowed the appeal with costs. Our decision was unanimous and these are our grounds for allowing the appeal and for ease of reference, parties will be referred to as they were in the High Court.

I

THE SALIENT FACTS

[4] The plaintiff is a company which is involved in the business of developing and servicing banking and retail technology.

[5] The defendant is a company in the business of selling computers and network integration system.

[6] The defendant had approached the plaintiff to assist them in providing Agent Banking System for Bank Simpanan National Bhd ('BSN') with a new banking system created by the plaintiff known as the Alexis System.

[7] After several discussions and presentations, BSN has indicated its intention to purchase the point of sale terminal ('POST') from the defendant, bundled with the maintenance service for the said terminals.

[8] Vide a letter of offer/appointment dated 15 September 2015, BSN had appointed the defendant to supply 1,000 units of POST for the BSN Agent Banking ('BSN project') for a contract sum of RM6.48m. Paragraph 1.1 of *Lampiran* 1 to the letter of offer/appointment reads as follows:

> 1.1 Tuan dikehendaki membekalkan CADANGAN PEROLEHAN 1,000 UNIT TERMINAL P.O.S (POINT OF SALE) BAGI TAHUN 2015 UNTUK BANK SIMPANAN NASIONAL, (Pembekalan) untuk kegunaan BSN (pembekalan). Peralatan yang dibekalkan mestilah mengikut skop dan spesifikasi yang telah ditetapkan oleh pihak Bank.

[9] It is common ground that BSN had entered into an agreement with the defendant and the plaintiff was not privy to the agreement entered between BSN and the defendant.

[10] The plaintiff then issued the quotation dated 17 September 2015, which was amended on 5 October 2015 for a sum of RM3,452,420 to the defendant.

[11] Having obtained the contract from BSN, the defendant issued a purchase order dated 22 September 2015 to purchase 986 units of GXDC3 Bio (basic model) and 14 units of GXDC3 Bio (total of 1,000 units) with barcode scanner from the plaintiff.

[12] The plaintiff terminated the agreement with the defendant on 20 April 2017 when the defendant did not issue another purchase order for the BSN project.

[13] The plaintiff then filed this suit for a breach of agreement by the defendant and for the return of the goods owned by the plaintiff. The plaintiff takes the position that the parties have a valid contract for five years for the purchase of 1,000 units of POST per year, with a total number of 5,000 units of POST.

[14] The main defence of the defendant is that there is no agreement to purchase 5,000 units of POST, and the agreement is only to purchase of 1,000 units of POST with free maintenance from the first year and maintenance fee for the second year onward.

DECISION OF THE HIGH COURT

[15] The High Court decided that there was a valid and binding contract between the parties to purchase 5,000 units of POST over a period of five years and ordered the defendant to pay the plaintiff damages in the sum RM9.8m for failing to purchase the balance 4,000 units of POST and RM6,892,968 as damages for the maintenance of the 5,000 units of POST for the balance of four years. Hence, the defendant filed this appeal against the decision of the High Court.

SUBMISSIONS OF PARTIES

[16] It is the plaintiff's case that at all material times, the agreement between the plaintiff and defendant is as follows:

(a) that the defendant must commit to purchase 5,000 units of POST over a period of five years;

(b) that the plaintiff will provide free maintenance for the terminals purchased for the first year, and subsequent commitment of the service for another four years with charges; and

(c) parties have agreed to 10% of the maintenance charges.

[17] The defendant takes the position that there is no contract for the sale and purchase of 5,000 units of POST over a five year period and that the parties had only agreed to the purchase of 1,000 units of POST with free maintenance for the first year and 10% charges for maintenance for the second year onward.

GROUNDS OF APPEAL

[18] The defendant has raised four main grounds of appeal:

(a) that the defendant has never agreed to purchase 5,000 units of POST and the purchase order was only for 1,000 units of the terminal;

(b) that the learned judge erred by taking into account the content of BSN's letter dated 15 September 2015 and PW2's evidence in coming into the decision that there was an agreement between the plaintiff and the defendant to purchase the remaining 4,000 units;

(c) that the learned judge came to the conclusion that there was an agreement without clear evidence and simply based on His Lordship's interpretation; and

(d) that the learned judge should not place the burden of proof on the defendant to call BSN to give evidence on its intention.

[19] Despite the four grounds of appeal, the plaintiff took the position that there is one core issue in this appeal, that is whether there was an agreement between the plaintiff and the defendant for the purchase of 5,000 units of POST over a period of five years and maintenance for five years thereon.

OUR DECISION

[20] We were mindful of the limited role of the appellate court in relation to findings of facts made by the court of first instance. In the case of *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97; [2003] 2 CLJ 19 the Court of Appeal held as follows:

> ... an appellate court will not, generally speaking, intervene unless the trial court is shown to be plainly wrong in arriving at its decision. But appellate interference will take place in cases where there has been no or insufficient judicial appreciation of the evidence.

[21] Reference is also made to the decision of the Federal Court in *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; [2004]4 CLJ 309 where the Federal Court held that the test of 'insufficient judicial appreciation of evidence' adopted by the Court of Appeal was in relation to the process of determining whether or not the trial court had arrived at its decision or findings correctly on the basis of the relevant law and the established evidence.

WHETHER A CONTRACT SUBSIST

[22] The High Court made a finding that there was an oral agreement between the parties on the following terms:

> Mahkamah bersetuju dengan hujahan Plaintif bahawa terma-terma yang dipersetujui dan dicapai adalah:
>
> (a) Plaintif membekalkan dan menjual sebanyak 5000 unit terminal POS dalam tempoh 5 tahun kepada Defendan (1000 unit setahun);
>
> (b) Defendan bersetuju fi penyelengaraan sebanyak 10% dari harga unit dan penyelengaraan tahun pertama adalah percuma.

[23] However, we are of the considered opinion that the factual matrix in this case do not support the judge's finding that there was an agreement for the plaintiff to supply 5,000 units of POST to the defendant over a five year period.

[24] The trial judge has failed to consider that there are no documentary evidence to show that the defendant has agreed to purchase 5,000 units of POST from the plaintiff for the BSN project. The following documents, however clearly establish that there was an agreement for the defendant to purchase only 1,000 units of POST from the plaintiff:

(a) vide an email dated 13 June 2015, En Azlan (plaintiff) informed En Saiful (defendant) that the plaintiff is providing the quotation for the BSN project, which reads, inter alia:

> The *minimum commitment in engaging our services for setting up the new server for BSN Agent Banking is by purchasing 1000 units product combination of GXDC3 Bio and iPad Bio.* (Emphasis added.)

(b) that the letter of offer/appointment dated 15 September 2015 issued by BSN to the defendant is for the supply of 1,000 units of POST;

(c) pursuant to BSN's letter of offer/appointment dated 15 September 2015, there was an exchange of email communications between the plaintiff and the defendant, where the parties referred to *'1,000 unit terminal baru*';

(d) that the plaintiff had issued a 'Quotation Pricing' dated 17 September 2015 and the defendant then issued a purchase order dated 22 September 2015 for the purchase of 1,000 units of POST for the sum of RM3,452,420; and

(e) that the plaintiff had issued a new 'Quotation Pricing' dated 5 October 2015 for the sale of 1,000 units of POST.

[25] Therefore, the above documents clearly establish that the parties have agreed to the sale and purchase of 1,000 units of POST. There is no reference at all to the 5,000 units in any of the above documents. In fact, the witness for the plaintiff had agreed that the final quotation issued by the plaintiff was the quotation dated 5 October 2015:

> Q: Right, then if you refer to the quotation at page 202, En Azlan *this is final quotation issued by the Plaintiff to the Defendant, right?*
>
> A: *Ya*
>
> Q: We look at this quotation page 202 particulars so quotation given by the Plaintiff to the Defendant for item number 1 GXDC3 Bio (Basic model) quantity is 986 then number 2 GXDC3 Bio with barcode scanner quantity 14?
>
> A: Yes

Q: And then there is the unit price and the amount. So the total amount is 3,452,420.00. So En. Azlan my question to you, *do you agree with me that this quotation is given by the Plaintiff only in respect of 1000 terminals to be purchased by the Defendant?*

A: Ya

[26] The High Court however made a finding that even though there was no written agreement entered between the parties, the following facts clearly established *consensus ad idem* (meeting of minds) between the plaintiff and the defendant of a contractual relationship for the sale and purchase of the terminals:

(a) that the defendant did not have the expertise to offer the technological service to BSN;

(b) that the presentation slides/documents of the proposal for the BSN project was prepared by the plaintiff to be presented to BSN; and

(c) that from the expertise and assistance given by the plaintiff, together with the conduct of both parties, the only conclusion is that the parties have come to an agreement that the plaintiff will assist the defendant to secure the BSN project, and that the agreement will benefit both parties.

[27] We are of the considered opinion that the above facts are not in dispute, that the defendant will purchase the terminals from the plaintiff and will supply the same to BSN pursuant to BSN's letter of offer/appointment dated 15 September 2015. The contractual relationship between the plaintiff and the defendant subsists from the quotation issued by the plaintiff and the purchase order issued by the defendant. All these documents clearly establish the sale and purchase of 1,000 units of POST, not 5,000 units.

[28] With regard to the note in the presentation to BSN which states of 'a yearly commitment order of 1,000 units' of POST, we are of the considered opinion that this is merely a proposal and BSN's letter of offer/appointment clearly confirms that the supply was only for 1,000 units of POST.

[29] The trial judge had applied the principle in *Kwek Seow Kee (No 1) & Anor v KT Packaging Sdn Bhd* [1998] MLJU 36; [1988] 2 CLJ Supp 472, on *consensus ad idem* (meeting of minds), and the relevant passage reads:

I am constrained to say that a contract may be found, as a fact, to be in existence despite the fact that it cannot be analysed precisely into *an offer and corresponding acceptance, provided that the terms have been fully agreed and executed by the parties.* (Emphasis added.)

[30] However in *Kwek Seow Kee*'s case, the court made a finding that the

contract came into existence as a result of performance, where the plaintiff handed the bank drafts to a third party, and the bank drafts were eventually credited into the defendant's bank account. In the present appeal, the performance of the parties to the contract was in relation to the supply of 1,000 units of POST, not 5,000 units.

TERMS OF THE CONTRACT

[31] The trial judge then made a finding that the agreed terms of the contract was that the plaintiff was to supply and deliver 5,000 units of POST to the defendant over a period of five years, with the purchase of 1,000 unit per year. In coming to such conclusion, the judge has considered the following issues:

(a) applying the test in *Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd* [2010] 1 MLJ 597;

(b) the BSN letter of offer/appointment dated 15 September 2015; and

(c) discussions between the parties and BSN post 2015 contract.

[32] In *Berjaya Times Square Sdn Bhd*, the Federal Court sets out the following guidelines in interpreting a contract:

> [42] Here it is important to bear in mind that a contract is to be interpreted in accordance with the following guidelines. First, a court interpreting a private contract is not confined to the four corners of the document. It is *entitled to look at the factual matrix forming the background to the transaction.* Second, the factual matrix which forms the background to the transaction includes all material that was reasonably available to the parties. Third, the interpreting court must disregard any part of the background that is declaratory of subjective intent only. Lastly, the court should adopt an objective approach when interpreting a private contract. See, *Investors Compensation Scheme Ltd v West Bromwich Building Society Investors Compensation Scheme Ltd v Hopkins & Sons (a firm) & Ors Alford v West Bromwich Building Society & Ors Armitage v West Bromwich Building Society & Ors* [1998] 1 All ER 98. As Lord Clyde said in *Bank of Credit and Commerce International SA (in liquidation) v. Ali & Ors* [2001] 2 WLR 735:
>
> > The knowledge reasonably available to them (that is to say the parties to the contract) must include matters of law as well as matters of fact. The problem is not resolved by asking the parties what they thought they intended. It is the imputed intention of the parties that the court is concerned to ascertain. The parties may well have never applied their minds to the particular eventuality which has subsequently arisen, so that they may never in fact have had any conscious intention in relation to that eventuality. It is an objective approach which is required and a solution should be found which is both reasonable and realistic. The meaning of the agreement is to be discovered from the words which they have used read in the context of the circumstances in which they made the agreement. *The exercise is not one where there are strict rules, but one where the solution is to be found by considering the language used by the parties against the*

background of the surrounding circumstances. (Emphasis added.)

[33] Applying the principles in *Berjaya Times Square Sdn Bhd*, the judge has considered the following 'surrounding circumstances':

(a) BSN akan menggantikan agen sistem perbankannya dari Epic Lanka kepada yang baharu;

(b) Defendan bersama sebuah syarikat dari Sri Lanka telah melaksanakan sistem Epic Lanka;

(c) hubungan rapat Defendan dengan BSN dalam sistem lama akan membolehkan Defendan mendapat tawaran pembekalan baharu;

(d) rangkaian terminal POS BSN adalah besar dan merangkumi seluruh negara;

(e) Plaintif telah melabur lebih kurang RM5.8 juta bagi mencipta dan membangunkan Alexis System dan sistem ini akan dicadangkan untuk digunakan oleh BSN bagi menggantikan sistem Epic Lanka;

(f) pelaburan yang besar ini menyebabkan Plaintif memerlukan pasaran yang banyak dan luas.

[34] Apart from narrating the above surrounding circumstances, the trial judge has failed to explain how the said circumstances clearly established an intention to contract for the supply of 5,000 units of POST over a five year period. The above surrounding circumstances merely evinced the intention of the parties to contract for the supply and purchase of POST for the BSN project and this crystallises with the purchase of 1,000 units of POST by the defendant for the BSN project. There is nothing in the narrated circumstances that evinced an intention for the sale and purchase of 5,000 units over a period of five years.

[35] In *Teras Kimia Sdn Bhd v Kerajaan Malaysia* [2014] 7 MLJ 584; [2014] 4 MLRH 429, the issue before the court is whether, in the absence of a written contract, a binding contract subsists, based on communications between parties and the conduct of parties. Justice Nallini Pathmanathan (now FCJ) applied the test in *RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG* [2010] 3 All ER 1 on the position of law on the question of whether a binding contract subsists. The relevant part of the judgment of Lord Clarke SCJ reads as follows:

> The general principle are not in doubt. *Whether there is a binding contract between the parties, and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind but upon a consideration of what was communicated between them by words or conduct and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all terms*

which they regarded or the law requires as essential for the formation of legally binding relations ... (Emphasis added.)

[36] Therefore, the task of the court is to ascertain objectively, whether on the basis of the communications as well as the conduct between the parties, a valid contract subsist for the supply and purchase of 5,000 units of POST over a period of five years.

[37] As narrated in para [25] above, the exchange of emails between the plaintiff and the defendant only makes reference to 1,000 units, not 5,000 units of POST. The conduct of the parties in entering into the sale and purchase agreement of 1,000 units of POST clearly negates the plaintiff's assertion that the parties had intended a five year supply of 5,000 units of POST.

BSN LETTER DATED 15 SEPTEMBER 2015

[38] The trial judge then looked at the BSN offer/appointment letter dated 15 September 2015, and the relevant part of the judgment reads as follows:

Tajuk surat tawaran tersebut adalah seperti berikut:

'SURAT TAWARAN BAGI CADANGAN PEROLEHAN 1000 UNIT TERMINAL POS (POINT OF SALE) BAGI TAHUN 2015 UNTUK BANK SIMPANAN NASIONAL' (garisan ditanda oleh saya).

Perenggan pertama surat tersebut menyatakan seperti berikut:

'BANK SJMPANAN NASIONAL ('BSN') dengan sukacitanya ingin memaklumkan bahawa kami bersetuju melantik syarikat tuan bagi CADANGAN PEROLEHAN 1000 UNIT TERMINAL POS (POINT OF SALE) BAGI TAHUN 2015 UNTUK BANK SIMPANAN NASIONAL' (garisan ditanda oleh saya)

[39] From the phrase 'BAGI TAHUN 2015', the trial judge made a finding and concludes that BSN had intended to buy 5,000 units over a five year period. His conclusion reads as follows:

Berdasarkan kepada fakta ini, Mahkamah berpendapat BSN sebenarnya bukan hanya ingin membeli 1000 unit terminal POS bagi tahun 2015 sahaja tetapi seperti yang telah dinyatakan oleh Plaintif dan seperti apa yang dipersetujui antara Defendan dengan BSN iaitu 5000 unit dalam tempoh 5 tahun. Jika BSN hanya ingin membuat pembelian one off sebanyak 1000 unit sahaja, mahkamah percaya surat tawarannya tidak akan menggunakan perkataan *'bagi tahun 2015'.* oleh itu Mahkamah tidak dapat menerima hujahan Defendan bahawa BSN hanya ingin membeli 1000 unit sahaja.

[40] In the first place, there is nothing in the BSN letter of offer/appointment that makes reference to 5,000 units of POST. The offer/appointment letter is only for the supply of 1,000 units. The trial judge has made a grave error in concluding that BSN had intended to buy 5,000 units over a five year period from the mere words of 'bagi tahun 2015'. There is nothing magical in those words as the letter of offer was issued in 2015, on 15 September 2015. Without any oral evidence from BSN, the trial judge's conclusion is mere conjecture and is simply erroneous.

[41] The trial judge had also made an error in law when he held that the defendant should have called a witness from BSN to ascertain if the real intention of BSN was to buy the 1,000 units or 5,000 units over a five year period. Bearing in mind that it is the plaintiff's case that there was an agreement for the sale and purchase of 5,000 units of POST, the burden is on the plaintiff to call the witness from BSN to explain the real intention of BSN. The onus is not on the defendant to prove otherwise, as the plaintiff must establish the fact of a contract for the supply of 5,000 units of POST. In *Sang Lee Co Sdn Bhd v Subramaniam a/l Mayawan & Ors* [2011] 5 MLJ 374; [2012] 6 MLRA 416, the Court of Appeal held as follows:

> [13] The plaintiffs who desire the court to give judgment as to their right or liability, dependent on the facts which they assert in relation to the oral contract bear the burden of proving on a balance of probabilities that they have an oral contract which is binding on the defendant.

POST 2015 DISCUSSION

[42] The trial judge also relied on subsequent discussion between the plaintiff, the defendant and BSN to support his finding that there was a concluded contract for the purchase of 5,000 units of POST over a five year period. The judge relied on the evidence of the plaintiff's witnesses that during the discussion on 21 February 2017, BSN did not dispute the agreement. The trial judge made this conclusion after making a finding that the defendant has failed to cross examine the witnesses 'secara panjang lebar dan secara serius'.

[43] We are of the considered opinion that the trial judge has failed to consider and appreciate the defendant's email to BSN dated 28 February 2017 and BSN's email dated 1 March 2017, which makes reference to the meeting on 21 February 2017, and they read as follows:

(a) defendant to BSN dated 28 February 2017:

> As per our previous meeting on 21st February 2017, our principal EMERICO Sdn Bhd requires BSN EB representative to issue official request to CD/ in order for us to proceed with the *renewal options.* We hope to receive your request as soon as *possible to avoid any delay in the proposal submission.*

Appreciate your prompt reply in this issue. (Emphasis added.)

(b) BSN to defendant dated 1 March 2017:

> Based on previous discussion dated 21st February 2017, *please submit your proposal* related to ALEXIS EB System application support & maintenance for a period of 12 months and others related to agent banking. However, please note that *all plans and proposals related to this is subject to our management approval.* (Emphasis added.)

[44] From the above exchange of emails, there is nothing to show that BSN had agreed to purchase 5,000 units of POST over a five year period. The defendant's email makes reference to a possible renewal of the supply contract, whilst BSN's reply was for the defendant and the plaintiff to submit the proposal, which is still subject to management approval.

MAINTENANCE FEE

[45] With regards to the maintenance fees, the trial judge made a finding that only the maintenance fees for the first year is free, whilst the defendant has to pay for the second to the fifth year of maintenance fees. Based on his finding that the parties have a contractual relationship for five years, the judge awarded RM6,892,968 as damages suffered by the plaintiff due to the defendant's failure to continue with the maintenance of 5,000 units of terminal for the following four years.

[46] It is not in dispute that the plaintiff's quotation dated 5 October 2015 clearly states that the contract price for the 1,000 units of POST is inclusive of the first year of maintenance. However, the charges for the second *year onward* is 10% of the product price per year. In view of our finding that there is no contract for the supply of POST for a period of five years together with the maintenance charges, we find this finding on damages is without basis and must be set aside.

[47] Added to that, it is also not in dispute that the plaintiff had terminated the contract on 20 April 2017. Therefore, we are of the considered opinion that the defendant *is not liable to pay the maintenance charges for the second year onward* as the plaintiff had terminated the contract, albeit on the maintenance issue.

[48] Premised on the reasons enumerated above, after having heard the parties and upon careful perusal of the records of appeal, we are of the considered opinion that this is a case in which appellate intervention is

warranted. We therefore allowed the defendant's appeal and set aside the decision of the learned High Court judge. We awarded costs of RM22,000 here and below, subject to allocator fee.

Appeal allowed with costs.

Reported by Nabilah Syahida Abdullah Salleh